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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91192781
Party	Plaintiff Bayer HealthCare LLC
Correspondence Address	BETH M GOLDMAN ORRICK HERRINGTON AND SUTCLIFFE LLP THE ORRICK BUILDING, 405 HOWARD STREET SAN FRANCISCO, CA 94105 UNITED STATES ipprosecutionsf@orrick.com
Submission	Motion to Extend
Filer's Name	Chelseaa Bush
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Date	11/30/2011
Attachments	Motion.PDF ( 65 pages )(664658 bytes ) Declaration.PDF ( 32 pages )(699166 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 77/701134

Published in the *Official Gazette* on July 28, 2009

Trademark: **LIXALEV**

<p>Bayer HealthCare LLC,</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">v.</p> <p>Biogen Idec MA Inc. and Cardiokine Biopharma, LLC,</p> <p style="text-align: center;">Applicants.</p>	<p>Opposition No.: 91192781</p>
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**Motion to Extend Discovery and All Subsequent Dates**

Opposer Bayer HealthCare LLC (“Opposer”) hereby moves the Board to extend the discovery period and all subsequent dates in the above-captioned opposition for an additional sixty (60) days from the date of the Board’s decision on this motion or for an amount of time deemed appropriate by the Board.<sup>1</sup> This extension is for good cause and is not necessitated by Opposer’s own lack of diligence or unreasonable delay and therefore should be granted pursuant to T.B.M.P. §509.01(a). After it became apparent that the parties could not settle their dispute, Opposer diligently pursued discovery throughout the discovery period and made every effort to obtain the necessary discovery by the current November 30, 2011 discovery deadline. Instead, it is because Applicants have failed to comply with their discovery obligations as detailed further below that Opposer must seek more time to obtain voluntarily or possibly compel further discovery.

**I. History of discovery**

Opposer provides below a brief history of the steps it has taken during discovery which evidences its continued diligence in this case.

In the first several months of the case, the parties attempted unsuccessfully to settle this dispute. Opposer then sent out its first set of discovery requests on September 21, 2010, and Applicants sent their first set of discovery requests on February 15, 2011. Declaration of Thomas H. Zellerbach in Support of Motion to Extend Discovery and All Subsequent Dates (“Zellerbach Decl.”), ¶ 2. Biogen Idec MA Inc. (“Biogen”) filed a Motion for Summary Judgment on October 15, 2010 which caused the proceedings to be suspended until

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<sup>1</sup> The parties have stipulated to extend dates (including an extension of expert discovery while fact discovery was on

December 14, 2010. Biogen did not respond to Opposer's discovery requests during that time. Opposer finally received Biogen's discovery responses on January 13, 2011. *Id.* ¶ 3. Opposer carefully reviewed Biogen's responses and found them deficient. Opposer exchanged letters and had telephone conferences with counsel for Biogen throughout March of 2011 in order to resolve their discovery disputes. In addition, on January 18, 2011, the Board approved adding Cardiokine Biopharma, LLC ("Cardiokine") as a party to this opposition and Opposer diligently requested additional discovery from Cardiokine. *Id.* ¶ 4.

Beginning on March 25, 2011, the opposition was again suspended to allow for discovery limited to expert witnesses. This suspension spanned from March 25-August 1, 2011 during which time Opposer took expert discovery but was foreclosed from obtaining discovery from any other witnesses in the case.

Promptly after discovery resumed on August 1, 2011, Opposer served deposition and document subpoenas on Brand Institute, Inc. ("BI") and William Johnson of BI (as an individual for his own personal knowledge), critical witnesses in this proceeding because they were integrally involved in the selection of the LIXALEV mark. *Id.* ¶ 5, Exhs. A and B. The information Opposer would obtain from BI would be essential for Opposer in order for it to take a thorough and effective deposition of Biogen and Cardiokine and it was therefore important that Opposer take these depositions first. Opposer scheduled the deposition of William Johnson for September 8, 2011 and BI for September 9, 2011 and asked both parties to produce documents by August 31, 2011. *Id.* ¶ 4. Shortly after serving the subpoenas, Opposer was informed by the

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suspension) on six occasions during this proceeding, with the first stipulation on June 29, 2010 and the last one on August 11, 2011.

General Counsel of BI, Chris Nikides, that William Johnson would be the designated witness to testify on behalf of BI (as well as testify on his own behalf). *Id.* ¶ 6. Moreover, BI informed Opposer that William Johnson and BI were not able to produce documents by August 31, 2011 and thus the deposition on September 8, 2011 could not go forward. Accordingly, on August 30, 2011, Opposer had to agree to extend the time for BI to produce documents until September 15, 2011 and to reschedule the deposition for October 6, 2011. *Id.* ¶ 7. Unfortunately, William Johnson and BI again were unable to meet these new dates and on September 12, 2011, Opposer was forced to agree to extend the time for BI and Mr. Johnson produce documents until September 19, 2011 with promised delivery no later than September 20, 2011. *Id.* ¶ 8. On September 20, 2011, Opposer received a massive document production from BI that totaled over 440,000 pages. *Id.* ¶ 9. In light of the extensive production and the time needed to review such an enormous production, the parties discussed moving the deposition. Opposer wanted to move the deposition only a short period, until October 12 or 13, 2011. Due to the unavailability of Mr. Johnson on those dates, Opposer and BI agreed that the deposition would occur on October 27, 2011. *Id.* ¶ 10. Upon review of BI's document production, Opposer wrote to BI about gaps in its production and Opposer and BI communicated on the document production from October 17-19, 2011. *Id.* ¶ 11. On October 19, 2011, BI produced additional documents and Opposer was finally able to take the deposition of William Johnson/BI on October 27, 2011. *Id.* ¶ 12. Opposer obviously had little choice but to accommodate the schedule of this important third-party witness.

At the same time that Opposer was working through document and deposition issues with BI, Opposer wrote to Applicants on October 19, 2011 and requested dates for taking the

depositions of Biogen and Cardiokine. *Id.* ¶ 13, Exh. C. Applicants wrote back the same day assuring Opposer that they would obtain dates and revert shortly. *Id.*, Exh. D.

Opposer, however, did not hear back from Applicants and, on November 2, 2011, again wrote to Applicants requesting possible depositions dates and a brief extension of the discovery period (set to close on November 30th) in order to accommodate the scheduling of the two depositions. *Id.* ¶ 14, Exh. E. On November 4, 2011, Applicants answered that they would be available during the week of November 14, 2011, but that they would not agree to any further extension of the discovery period. Applicants further wrote that they might have been willing to conduct the two depositions after the formal close of discovery. *Id.* ¶ 15, Exh.F.

Opposer's counsel was unable to change his schedule on such short notice to take the depositions during the one week of November 14, 2011.<sup>2</sup> *Id.* ¶ 16. Opposer asked Applicants to compromise and agree to even a brief extension to allow for the depositions during the discovery period. *Id.*, ¶ 17, Exh. G. Applicants denied the request, offering a boilerplate and empty excuse that Opposer wanted the brief extension "to harass Biogen and Cardiokine and to waste their time and resources." *Id.* ¶ 18, Exh. H. Rather than spar over the discovery period through further letters and motions, Opposer renewed its attempt to accommodate Applicants and proposed November 28th and 29th, the two days following the Thanksgiving break. Counsel for Opposer rearranged his family holiday travel plans so that he would be able to take depositions on the East Coast (Biogen is located in Boston and Cardiokine in Philadelphia). *Id.* ¶ 19. Applicants agreed to the deposition dates and requested they both be in Boston at counsel for

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<sup>2</sup> Opposer would be prejudiced by having a new attorney not familiar with the large documentary record take the depositions.

Applicants' law firm. Opposer agreed to this request. Zellerbach Decl., ¶ 20. Opposer served Applicants' counsel with 30(b)(6) Deposition Notices for Biogen and Cardiokine requesting that they provide a person from each company knowledgeable on the list of topics provided in the Notice. Notice of Deposition of Biogen Idec MA Inc. Pursuant to Rule 30(B)(6) attached herewith as Exhibit A; Notice of Deposition of Cardiokine Biopharma, LLC Pursuant to Rule 30(B)(6) attached herewith as Exhibit B.

As evidenced above, Opposer has worked diligently to complete discovery while at the same time trying to accommodate both Applicants' and third-party witness' schedules.

## **II. Applicants failure to comply with their discovery obligations**

Because of its diligent efforts, Opposer would have successfully obtained the necessary discovery by the November 30, 2011 discovery deadline if Applicants had fulfilled their discovery obligations. But they did not. As explained below, Biogen did not produce a knowledgeable 30(b)(6) witness on November 28, 2011 and Cardiokine did not produce all the responsive documents in its possession as Opposer learned at Cardiokine's deposition on November 29, 2011. Opposer therefore has no choice but to seek an extension of the discovery period to remedy these inadequacies in a manner that does not prejudice Opposer.

### **A. The Biogen 30(b)(6) Witness**

On November 28, 2011, Biogen produced Mr. Joerg Hermans, the current Senior Director of Operations in the Emerging Markets Group at Biogen, as the 30(b)(6) witness to testify on behalf of Biogen regarding the topics listed in the Biogen Deposition Notice relating to the LIXALEV mark and product. In producing a 30(b)(6) witness, Biogen had "an obligation not

only to pick and produce persons that have knowledge of the subject matter identified in the notice but also to prepare those persons so that they can give complete, knowledgeable, and binding answers as to matters known or reasonably known to the organization.” T.B.M.P. §404.06(b). Despite this clear obligation under the Board rules, Mr. Hermans had neither personal knowledge regarding many of the topics enumerated in the Biogen Deposition Notice nor did he take any steps to review the relevant records of Biogen or otherwise prepare himself so he could give complete, knowledgeable answers on behalf of Biogen.

According to Mr. Hermans,

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Deposition Testimony of Mr. Joerg P. Hermans (“Hermans Deposition”) at 7:11, 13:25, 14:1-2 attached hereto as Exhibit C.

**REDACTED**

*Id.* at 7:15-18 attached hereto as Exhibit D. **REDACTED**

**REDACTED**

*Id.* at 8:14:19 attached hereto as Exhibit E.

**REDACTED** *Id.* at 7:6-16, 22:17-19 attached hereto as

Exhibit F.

he could not provide information reasonably available to Biogen at the deposition but could only provide testimony from his limited memory of his short time working on the LIXALEV mark



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*Id.* at 72:17-19 attached hereto as Exhibit G. But Biogen had an obligation to produce responses that represented company knowledge, not an individual's limited knowledge. Biogen, therefore, clearly has not satisfied its obligation under T.B.M.P. §404.06(b) to produce a witness who can provide knowledgeable and binding answers reflecting the information available to the company.

In fact, Mr. Hermans' combined lack of personal knowledge and lack of preparation for the deposition made him unable to answer questions on many key topics in the Biogen Deposition Notice that are crucial for Opposer's case. For example, Opposer requested a witness able to answer questions regarding the testing of the product that Biogen and/or Cardiokine intend to market under the LIXALEV mark as well as the safety and efficacy of the product. Exh. A at 3. This information is potentially crucial for Opposer in showing a likelihood of dilution of the ALEVE mark, particularly if there are any negative results or safety issues.

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Opposer is not requiring that Biogen produce a witness with encyclopedic knowledge of the clinical trials of the product but, under T.B.M.P. §404.06(b), Opposer is certainly entitled to, and Biogen is obligated to produce, a witness with knowledge of company business rather than just personal experience.

Opposer also requested a witness knowledgeable about the selection of the LIXALEV mark. Exh. A at 3.

**REDACTED**

**REDACTED**

Opposer also requested a witness knowledgeable about any surveys or focus groups regarding the LIXALEV mark and communications with Brand Institute. Exh. A at 3.

**REDACTED**

Opposer also requested a witness knowledgeable about the documents produced by Biogen in this proceeding. Exh. A at 3.

**REDACTED**

REDACTED

Opposer has presented only a few representative examples of Mr. Herman's inability to provide the information reasonably sought by Opposer in its Biogen Deposition Notice, information that is known, or reasonably available to, Biogen. As such, Biogen has not fulfilled its obligations to produce a witness pursuant to T.B.M.P. §404.06(b).

**B. Responsive Documents Not Yet Produced By Cardiokine**

In addition, Opposer has learned from the deposition of Cardiokine on November 29, 2011 that Cardiokine has additional documents that are responsive to Opposer's First Set of Document Requests to Applicant ("Document Requests") that it has not produced.

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Deposition") at 44:14-21 attached hereto as Exhibit U. Opposer specifically requested "prototypes and drawings, of all packaging and labeling, currently used or intended to be used" and asked Cardiokine to supplement the document responses when Cardiokine joined this proceeding. Cardiokine has not fulfilled its obligation to supplement Applicants' document production with these responsive documents.

Counsel for Opposer and Biogen have discussed Opposer's complaints about Biogen's witness and missing documents and agreed to try to resolve the issues so that a motion to compel will not be necessary. However, until missing information is hopefully provided by Biogen and

Opposer can assess the completeness of that information, Opposer needs for the discovery period to remain open to that it can quickly follow up on the missing information, if necessary, and also so that it is not unfairly jammed for time between obtaining complete information and making its pretrial disclosures. Applicants' refusal to agree even to a 30-day extension has necessitated this motion. Zellerbach Declaration, ¶ 21.

As shown above, Opposer's request for an extension is not the result of a lack of due diligence or undue delay by Opposer. To the contrary, Opposer has continuously pressed for discovery throughout the permissible discovery periods and has made diligent efforts to complete discovery by November 30, 2011. If there has been *any* delay outside of the suspension periods, it was the result of third-party scheduling issues that were out of Opposer's control and pushed back the BI deposition by almost two months.

Opposer will be prejudiced if discovery is not extended. Opposer requires additional information from knowledgeable witnesses of Biogen and will likely need to authenticate any newly produced documents from Cardiokine through a Request for Admission. Opposer therefore needs an extension of the discovery period in order to take these steps and any other steps that prove necessary after it receives more information from Biogen and Cardiokine. Opposer should not be foreclosed from obtaining and authenticating all necessary discovery because of any failure by Applicants to fulfill their discovery obligations.

In contrast, an extension will not prejudice Applicants. Opposer is seeking a sixty (60) day extension from the date of the Board's decision (recognizing that there are a number of holidays in December) or any other amount of time deemed appropriate by the Board that enables Opposer to hopefully resolve the outstanding discovery issues. Such a short extension will not

cause undue delay in the progression of this case.

**REDACTED**

Opposer is hopeful that it can resolve its discovery disputes with Applicants and avoid filing a Motion to Compel that would further burden the parties as well as the Board. Opposer does, however, reserve the right to file a Motion to Compel should its efforts to reach an amicable resolution with Applicants fail.

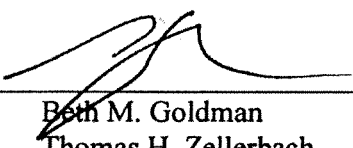
In light of the above, good cause exists for a further extension of the discovery period. Opposer hereby respectfully requests that the Board grant a sixty (60) day extension of the dates from the date of the Board's decision on this Motion, or any other period of time that the Board deems appropriate.

Respectfully submitted,

ORRICK HERRINGTON & SUTCLIFFE LLP

Dated: November 30, 2011

By: \_\_\_\_\_

  
Beth M. Goldman  
Thomas H. Zellerbach  
Chelseaa E.L. Bush

Attorneys for Bayer HealthCare LLC  
405 Howard Street  
San Francisco, CA 94105  
415-773-5700

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing MOTION TO EXTEND DISCOVERY AND ALL  
SUBSEQUENT DATES was served by mail on November 30, 2011, on Applicants' counsel at  
the following address:

Douglas R. Wolf  
Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
600 Atlantic Avenue  
Boston, MA 02210

Dated: November 30, 2011

By:

  
Chelsea Bon

# EXHIBIT A



In the Matter of Application Serial No. 77/701134  
Published in the *Official Gazette* on July 28, 2009  
Trademark: **LIXALEV**

PLEASE TAKE NOTICE that, pursuant to Federal Rule of Civil Procedure 30(b)(6), Bayer HealthCare LLC ("Bayer") will take the deposition upon oral examination of Biogen Idec MA Inc. ("Biogen"), commencing on November 29, 2011 at 9:30 a.m., at Wolf, Greenfield & Sacks, P.C., 600 Atlantic Avenue, Boston, Massachusetts, or at such other time and place as may be mutually agreed upon by counsel, and continuing from day to day thereafter.

Pursuant to Fed. R. Civ. P. 30(b)(6), Biogen is notified that it must designate one or more officers, directors, managing agents, employees or other persons who are most qualified to testify on its behalf as to the matters set forth in Exhibit A attached hereto. Said deposition will commence at the above date and time and continue from day to day thereafter, Saturdays, Sundays, and holidays excepted, until completed by the noticing party.

ORRICK, HERRINGTON & SUTCLIFFE LLP

Dated: November 4, 2011

By: 

Beth M. Goldman

Attorneys for Opposer  
405 Howard Street  
San Francisco, California 94105  
(415) 773-5700

**REDACTED COPY**

## **EXHIBIT A**

### **TOPICS FOR EXAMINATION**

1. Biogen's responses to Opposer's First Set of Interrogatories, First Set of Requests for Production and First Set of Requests for Admissions to Applicant.
2. Documents produced by Biogen in this proceeding.
3. Biogen's selection of the LIXALEV mark.
4. Any surveys or focus groups regarding the LIXALEV mark.
5. Applications for registration of LIXALEV with any governmental agency in the United States.
6. Advertising and promotional activities and plans relating to the LIXALEV mark.
7. The channels of trade for the product Biogen and/or Cardiokine Biopharma, LLC ("Cardiokine") intend to market under the LIXALEV mark.
8. Products and the packaging for those products that Biogen and/or Cardiokine intend to market under the LIXALEV mark.
9. Development and testing of the products that Biogen and/or Cardiokine intend to market under the LIXALEV mark.
10. Characteristics of purchasers or intended purchasers of the goods to be offered under the LIXALEV mark.
11. Use or future plans for use of the LIXALEV mark.
12. The identity of all witnesses Biogen intends to call at trial on this matter and the topics about which they will testify.
13. All facts Biogen intends to rely upon, if any, in order to demonstrate that there is no likelihood of confusion between ALEVE on one hand, and LIXALEV, on the other.
14. All facts Biogen intends to rely upon, if any, in order to demonstrate that use of the LIXALEV mark is not likely to cause dilution of the ALEVE mark.
15. Communications with Brand Institute, Inc.
16. The safety and efficacy of lixivaptan.
17. Filings with and responses from the US Federal Drug Administration and the European Medicines Agency regarding the LIXALEV mark.

**REDACTED COPY**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing NOTICE OF DEPOSITION OF BIOGEN IDEC MA INC. PURSUANT TO RULE 30(b)(6) was served by First Class U.S. mail, on November 14, 2011, on Biogen's counsel at the following address:

Douglas R. Wolf  
Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
600 Atlantic Avenue  
Boston, MA 02210

Dated: November 14, 2011



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Karin Barnick

**REDACTED COPY**

## **EXHIBIT B**

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In the Matter of Application Serial No. 77/701134  
Published in the *Official Gazette* on July 28, 2009  
Trademark: **LIXALEV**

PLEASE TAKE NOTICE that, pursuant to Federal Rule of Civil Procedure 30(b)(6), Bayer HealthCare LLC ("Bayer") will take the deposition upon oral examination of Cardiokine Biopharma, LLC ("Cardiokine"), commencing on November 28, 2011 at 9:30 a.m., at 1801 Market Street, 18<sup>th</sup> Floor, Philadelphia, Pennsylvania 19103 or at such other time and place as may be mutually agreed upon by counsel, and continuing from day to day thereafter.

The deposition will be taken by stenographic means before a person authorized to administer oaths. Attorneys may also use equipment providing for simultaneous stenography during the deposition.

Pursuant to Fed. R. Civ. P. 30(b)(6), Cardiokine is notified that it must designate one or more officers, directors, managing agents, employees or other persons who are most qualified to testify on its behalf as to the matters set forth in Exhibit A attached hereto. Said deposition will commence at the above date and time and continue from day to day thereafter, Saturdays, Sundays, and holidays excepted, until completed by the noticing party.

ORRICK, HERRINGTON & SUTCLIFFE LLP

Dated: November/4, 2011

By: \_\_\_\_\_

  
Beth M. Goldman

Attorneys for Opposer  
405 Howard Street  
San Francisco, California 94105  
(415) 773-5700

**REDACTED COPY**

## **EXHIBIT A**

### **TOPICS FOR EXAMINATION**

1. Applicants' responses to Opposer's First Set of Interrogatories, First Set of Requests for Production and First Set of Requests for Admissions to Applicant.
2. Documents produced by Applicants in this proceeding.
3. Applicants' selection of the LIXALEV mark.
4. Any surveys or focus groups regarding the LIXALEV mark.
5. Applications for registration of LIXALEV with any governmental agency in the United States.
6. Advertising and promotional activities and plans relating to the LIXALEV mark.
7. The channels of trade for the products Cardiokine intends to market under the LIXALEV mark.
8. Products and the packaging for those products that Cardiokine intends to market under the LIXALEV mark.
9. Development and testing of the products that Cardiokine intends to market under the LIXALEV mark.
10. Characteristics of purchasers or intended purchasers of Cardiokine's goods to be offered under the LIXALEV mark.
11. Use or future plans for use of the LIXALEV mark.
12. The identity of all witnesses Cardiokine intends to call at trial on this matter and the topics about which they will testify.
13. All facts Cardiokine intends to rely upon, if any, in order to demonstrate that there is no likelihood of confusion between ALEVE on one hand, and LIXALEV, on the other.
14. All facts Cardiokine intends to rely upon, if any, in order to demonstrate that use of the LIXALEV mark is not likely to cause dilution of the ALEVE mark.
15. Communications with Brand Institute, Inc.
16. The safety and efficacy of lixivaptan.
17. Filings with and responses from the US Federal Drug Administration and the European Medicines Agency regarding the LIXALEV mark.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing NOTICE OF DEPOSITION OF CARDIOKINE BIOPHARMA, LLC PURSUANT TO RULE 30(b)(6) was served by First Class U.S. mail, on November 14, 2011, on Cardiokine's counsel at the following address:

Douglas R. Wolf  
Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
600 Atlantic Avenue  
Boston, MA 02210

Dated: November 14, 2011

  
Karin Barnick

**REDACTED COPY**

ORRICK, HERRINGTON & SUTCLIFFE LLP

Dated: November 4, 2011

By: \_\_\_\_\_

  
Beth M. Goldman

Attorneys for Opposer  
405 Howard Street  
San Francisco, California 94105  
(415) 773-5700

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## EXHIBIT C

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## EXHIBIT D

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## EXHIBIT E

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## EXHIBIT F

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## EXHIBIT G

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# EXHIBIT H

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## EXHIBIT J

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 77/701134  
Published in the *Official Gazette* on July 28, 2009  
Trademark: **LIXALEV**

Bayer HealthCare LLC,  Opposer,  v.  Biogen Idec MA Inc. and Cardiokine Biopharma, LLC,  Applicants.	Opposition No.: 91192781
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**DECLARATION OF THOMAS ZELLERBACH IN SUPPORT OF OPPOSER'S  
MOTION TO EXTEND DISCOVERY AND ALL SUBSEQUENT DATES**

I, THOMAS ZELLERBACH, declare as follows:

1. I am a partner in the law firm of Orrick, Herrington & Sutcliffe, LLP, counsel for Opposer Bayer HealthCare LLC ("Bayer" or "Opposer"). Except where stated upon information and belief, this declaration is based upon personal knowledge and facts gathered upon my request and under my supervision. If called as a witness, I could testify to these facts.
2. Based on information and belief from records of this case, Opposer sent out its first set of discovery requests in this proceeding on September 21, 2010 and Applicants sent their first set of discovery requests on February 15, 2011.
3. Based on information and belief from records of this case, Opposer received Biogen Idec MA Inc.'s ("Biogen") discovery responses on January 13, 2011.
4. Based on information and belief from records of this case, Opposer requested additional discovery from Cardiokine Biopharma, LLC ("Cardiokine") after the Board approved

adding Cardiokine as a party to this opposition (Biogen and Cardiokine collectively “Applicants”).

5. Opposer served subpoenas on Brand Institute, Inc. (“BI”) and William Johnson scheduling the deposition of William Johnson for September 8, 2011 and BI for September 9, 2011 and asking both parties to produce documents by August 31, 2011. Attached hereto as Exhibit A is a true and correct copy of the deposition subpoena and document subpoena of William Johnson; attached hereto as Exhibit B is a true and correct copy of the deposition subpoena and document subpoena of BI.

6. Chris Nikides, General Counsel of BI, informed me that William Johnson would be the designated person to testify on behalf of BI.

7. William Johnson and BI were not able to produce documents by August 31, 2011 and I was informed by Mr. Nikides that they could not attend the deposition on September 8, 2011. On August 30, 2011, and I agreed to extend the time for them to produce documents to September 15, 2011 and rescheduled the deposition of William Johnson for October 6, 2011.

8. Mr. Nikides informed me that William Johnson and BI again were unable to meet these new dates and on September 12, 2011, I agreed to extend the time to produce documents until September 19, 2011 with the agreement that the documents arrive at my offices no later than September 20, 2011.

9. On September 20, 2011, I received the document production from BI which totaled over 440,000 pages.

10. In light of the extensive production by BI, I discussed with Mr. Nikides moving the deposition a short time. I wanted to move the deposition only a short period, until October 12 or 13, 2011. I was informed that William Johnson could not attend on either of these dates, however, and we agreed on October 27, 2011 for the deposition.

11. Upon review of BI's document production, I wrote to BI about gaps in its document production. We communicated on the document production from October 17-19, 2011.

12. On October 19, 2011, BI produced additional documents. On October 27, 2011, I took the deposition of William Johnson and BI in New York.

13. On October 19, 2011, I wrote to the attorney for Applicants requesting dates for taking the depositions of Biogen and Cardiokine. Attached hereto as Exhibit C is a true and correct copy of the October 19, 2011 email that I sent to counsel for Applicants. On that date, counsel for Applicants wrote back that she would obtain dates and revert shortly. Attached hereto as Exhibit D is a true and correct copy of the email I received from the attorney for Applicants.

14. I did not hear from Applicants' counsel and so, on November 2, 2011, I again wrote to her asking for possible deposition dates and also requesting a brief extension of the discovery period to accommodate the depositions. Attached hereto as Exhibit E is a true and correct copy of the November 2, 2011 follow-up email that I sent to counsel for Applicants.

15. On November 4, 2011, counsel for Applicants answered that Biogen and Cardiokine would be available the week of November 14, 2011 but that they would not agree to any extension of the discovery period. Applicants further wrote that they might have been willing to conduct the two depositions after the formal close of discovery. Attached hereto as Exhibit F is a true and correct copy of the November 4, 2011 email that I received from counsel for Applicants.

16. I was unable to take the depositions during the week of November 14, 2011.

17. I asked again for a short extension of the discovery period to allow for these depositions to be taken during the discovery period so as to protect Bayer's rights. Attached

hereto as Exhibit G is a true and correct copy of my email to counsel for Applicants again requesting a short extension of dates.

18. In a letter dated November 11, 2011, Applicants denied Bayer's request for a short extension with the unfounded and false excuse that Opposer wanted the brief extension "to harass Biogen and Cardiokine and to waste their time and resources." Attached hereto as Exhibit H is a true and correct copy of counsel for Applicants' letter. Because Applicants' letter contained a number of statements I found to be wrong or misleading, I wrote back to counsel for Applicants to correct these statements. Attached hereto as Exhibit I is a true and correct copy of my letter to counsel for Applicants.

19. I rearranged my family holiday travel plans so that I could be on the East Coast to take the depositions of Cardiokine and Biogen on November 28th and November 29th.

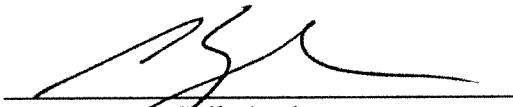
20. Applicants agreed to the deposition dates but asked that both depositions take place in Boston at their counsel's office and I agreed.

21. I met and conferred with Applicants' counsel on November 29, 2011 to discuss my concerns that Biogen's designated witness was neither knowledgeable nor prepared to testify on various matters about which Bayer has sought information. I also requested a 30-day extension of the discovery cut-off to enable the parties to work through these issues. While counsel for Applicants agreed to look into and try to address my complaints, he refused to consider any extension of the discovery period. I also met and conferred with counsel for Applicants on November 30, 2011 to request that Applicants produce certain responsive documents that were identified during the depositions of Biogen and Cardiokine.

REDACTED COPY

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of November, 2011 in Menlo Park, California.

  
Thomas Zellerbach

# **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing DECLARATION OF THOMAS ZELLERBACH IN  
SUPPORT OF OPPOSER'S MOTION TO EXTEND DISCOVERY AND ALL SUBSEQUENT  
DATES was served by mail on November 30, 2011, on Applicants' counsel at the following  
address:

Douglas R. Wolf  
Christina M. Licursi  
Wolf, Greenfield & Sacks, P.C.  
600 Atlantic Avenue  
Boston, MA 02210

Dated: November 30, 2011

By:

  
\_\_\_\_\_  
Chelsea Bush



# EXHIBIT A

**UNITED STATES DISTRICT COURT  
for the  
Southern District of New York**

BAYER HEALTHCARE	)	
LLC	)	
	)	
v.	)	OPPOSITION PENDING AT
	)	THE UNITED STATES
BIOMGEN IDEC MA INC.	)	TRADEMARK TRIAL AND
AND CARDIOKINE	)	APPEAL BOARD AT
BIOPHARMA, LLC	)	PROCEEDING NO. 91192781
	)	

**SUBPOENA TO TESTIFY AT A DEPOSITION IN A TRADEMARK TRIAL AND  
APPEAL BOARD OPPOSITION**

To: Mr. Walter Johnson, Brand Institute, Inc., 42 Broadway, Suite 1700, New York,  
New York 10004

**YOU ARE COMMANDED** to appear at the time, date, and place set forth below to  
testify at a deposition to be taken in this administrative proceeding at the Trademark Trial  
and Appeal Board.

**Place:** Orrick Herrington & Sutcliffe, LLP, 51 West 52nd Street, New York, NY 10019

**Date and Time:** September 8, 2011, commencing at 9:30 a.m.

The deposition will be recorded by this method: stenographically

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to  
a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and  
the potential consequences of not doing so, are attached.

Date: August 11, 2011



---

Clifford R. Michel, Attorney Admitted in New York

**REDACTED COPY**

The names, addresses, e-mails, and telephone numbers of the attorneys representing Bayer HealthCare LLC who request this subpoena are:

BETH M. GOLDMAN, ORRICK HERRINGTON & SUTCLIFFE LLP, 405 Howard Street, San Francisco, California 94105, [beth.goldman@orrick.com](mailto:beth.goldman@orrick.com), 415-773-5700

THOMAS H. ZELLERBACH, ORRICK HERRINGTON & SUTCLIFFE LLP, 1000 Marsh Road, Menlo Park, California 94025, [tzellerbach@orrick.com](mailto:tzellerbach@orrick.com), 650-614-7400

REDACTED COPY

**UNITED STATES DISTRICT COURT  
for the  
Southern District of New York**

BAYER HEALTHCARE	)	
LLC	)	
	)	
v.	)	OPPOSITION PENDING AT
	)	THE UNITED STATES
BIOMERIEUX INC.	)	TRADEMARK TRIAL AND
AND CARDIOLIFE	)	APPEAL BOARD AT
BIOMERIEUX, LLC	)	PROCEEDING NO. 91192781
	)	

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION OR OBJECTS IN A  
TRADEMARK TRIAL AND APPEAL BOARD OPPOSITION**

**To: Mr. Walter Johnson, Brand Institute, Inc., 42 Broadway, Suite 1700, New York,  
New York 10004**

***Production:* YOU ARE COMMANDED to produce at the time, date, and place set forth  
below the following documents, electronically stored information, or objects and permit  
their inspection, copying, testing, or sample of the material:**

**See Attachment A**

**Place: Orrick Herrington & Sutcliffe, LLP, 51 West 52nd Street, New York, NY 10019**

**Date and Time: August 31, 2011, commencing at 10 a.m.**

**The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to  
a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and  
the potential consequences of not doing so, are attached.**

**Date: August 11, 2011**



**Clifford R. Michel, Attorney Admitted in New York**

**REDACTED COPY**

The names, addresses, e-mails, and telephone numbers of the attorneys representing Bayer HealthCare LLC who request this subpoena are:

BETH M. GOLDMAN, ORRICK HERRINGTON & SUTCLIFFE LLP, 405 Howard Street, San Francisco, California 94105, [beth.goldman@orrick.com](mailto:beth.goldman@orrick.com), 415-773-5700

THOMAS H. ZELLERBACH, ORRICK HERRINGTON & SUTCLIFFE LLP, 1000 Marsh Road, Menlo Park, California 94025, [tzellerbach@orrick.com](mailto:tzellerbach@orrick.com), 650-614-7400

**REDACTED COPY**

**ATTACHMENT A**

**DOCUMENTS REQUESTED FOR PRODUCTION**

**DEFINITIONS**

The following definitions apply to the document requests below:

**"Document":** The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy is a separate document within the meaning of this term.

**"Concerning":** The term "concerning" means relating to, referring to, describing, evidencing or constituting.

**"Communication"** means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

**"And/Or":** The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

**SPECIFIC DOCUMENT REQUESTS**

1. All documents concerning the development of a brand name for Lixivaptan.
2. All documents concerning the project Luxor conducted on behalf of Biogen Idec MA Inc. and/or Cardiokine Biopharma LLC.
3. All documents concerning communications between Brand Institute, Inc. and Biogen Idec MA Inc. and/or Cardiokine Biopharma LLC concerning the development of a brand name for Lixivaptan and/or Project Luxor.
3. All documents concerning the brand name LIXALEV.
4. All documents concerning any screenings and/or searches conducted on LIXALEV.
5. All document concerning how LIXALEV relates to "Alleviate (Provide Relief)."
6. All documents concerning the brand name or product ALEVE.

**REDACTED COPY**

## **EXHIBIT B**

**REDACTED COPY**

# UNITED STATES DISTRICT COURT

for the

Southern District of Florida

**BAYER HEALTHCARE LLC**

*Plaintiff*

v.

**BIOGEN IDEC MA INC. AND CARDIOKINE**

**BIOPHARMA, LLC**

*Defendants*

Civil Action No. TTAB PROCEEDING 911027/01

(If the action is pending in another district, state where  
US Trademark Trial and Appeal Board )

## SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Brand Institute, Inc., 200 SE 1st Street, 12th Floor, Miami, Florida 33131

**TTAB PROCEEDING**

**Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is not a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

See Appendix A

Place: Veritas, 18 West Flagler Street  
Miami, Florida 33130

Date and Time:

9/9/2011 9:30 am

The deposition will be recorded by this method: steno-graphy

- ☐ Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 9/12/11

CLERK OF COURT

Steven M. Larimore

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Bayer HealthCare LLC

, who issues or requests this subpoena, are:  
Thomas H. Zellerbach, Orrick Herrington & Sutcliffe LLP, 1000 Marsh Road, Menlo Park, CA 94025,  
tzellerbach@orrick.com, 650-614-7400

ENTERED

AUG 20 2011

REDACTED COPY

CALENDAR



**Appendix A**

**Topics for Examination**

1. Project Lumar conducted on behalf of Biogen Idec MA Inc.
2. The creation and selection of the brand name LIXALEV as proposed to Biogen Idec MA Inc.
3. Communications between Broad Institute, Inc. and Biogen Idec MA Inc. and/or CardioKine Biopharma, LLC. related to Project Lumar and the selection of a brand name for the drug Lixivaptan.
4. The creation and authenticity of documents produced by Broad Institute, Inc. pursuant to subpoenas in this matter.

**REDACTED COPY**

# UNITED STATES DISTRICT COURT

for the

Southern District of Florida

**BAYER HEALTHCARE LLC**

*Plaintiff*

**BIOTEC IDEC MA INC. AND CARDIOLINE  
BIOPHARMA, LLC**

*Defendant*

Civil Action No. TTAB Proceeding 91192781

(If the action is pending in another district, state where:  
US Trademark Trial and Appeal Board )

## SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A ~~PROCEEDING~~

To: Brand Institute, Inc., 200 SE 1st Street, 12th Floor, Miami, Florida 33131

**TTAB PROCEEDING**

☒ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

See Attachment A

Place: Veritad, 19 West Flagler Street  
Miami, Florida 33130

Date and Time:

8/31/2011 10:00 am

☐ **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 9/12/11

CLERK OF COURT

Steven M. Larimore

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) **Bayer HealthCare LLC**

, who issues or requests this subpoena, are:  
Thomas H. Zellerbach, Orrick Herrington & Sutcliffe, LLP, 1000 Marsh Rd, Menlo Park, CA 94025, tzellerbach@orrick.com, 650-614-7400

**ATTACHMENT A**  
**DOCUMENTS REQUESTED FOR PRODUCTION**

**DEFINITIONS**

The following definitions apply to the document requests below:

**"Document":** The term "document" is defined to be synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Fed. R. Civ. P. 34(a)(1)(A). A draft or non-identical copy is a separate document within the meaning of this term.

**"Concerning":** The term "concerning" means relating to, referring to, describing, evidencing or constituting.

**"Communication"** means the transmittal of information (in the form of facts, ideas, inquiries or otherwise).

**"And/Or":** The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

**SPECIFIC DOCUMENT REQUESTS**

1. All documents concerning the development of a brand name for Lixivaptan.
2. All documents concerning the project Luxor conducted on behalf of Biogen Idec MA Inc. and/or Cardiokine Biopharma LLC.
3. All documents concerning communications between Brand Institute, Inc. and Biogen Idec MA Inc. and/or Cardiokine Biopharma LLC concerning the development of a brand name for Lixivaptan and/or Project Luxor.
3. All documents concerning the brand name LIXALEV.
4. All documents concerning any screenings and/or searches conducted on LIXALEV.
5. All document concerning how LIXALEV relates to "Alleviate (Provide Relief)."
6. All documents concerning the brand name or product ALEVE.

**REDACTED COPY**

# EXHIBIT C

**REDACTED COPY**

**Bush, Chelseaa**

---

**From:** Zellerbach, Thomas H.  
**Sent:** Wednesday, October 19, 2011 2:25 PM  
**To:** Christina M. Licursi  
**Cc:** Goldman, Beth M.; Bush, Chelseaa  
**Subject:** Depositions

Christina,

I want to confirm that the deposition of Brand Institute/William Johnson is going forward on October 27, 2011 at Orrick's New York office located at 51 West 52<sup>nd</sup> Street. It will begin at 10 a.m. EDT.

In addition, we would like to schedule the depositions of both Biogen and Cardiokine for next month. Can you please provide me some dates?

Thanks,

Tom



**O R R I C K**

**THOMAS H. ZELLERBACH**

*Partner*

**ORRICK, HERRINGTON & SUTCLIFFE LLP**

1000 MARSH ROAD

MENLO PARK, CA 94025-1015

tel (650) 614-7446

fax (650) 614-7401

[tzellerbach@orrick.com](mailto:tzellerbach@orrick.com)

[www.orrick.com](http://www.orrick.com)

**REDACTED COPY**

## **EXHIBIT D**

**REDACTED COPY**

## **Bush, Chelseaa**

---

**From:** Christina M. Licursi [Christina.Licursi@WolfGreenfield.com]  
**Sent:** Wednesday, October 19, 2011 2:39 PM  
**To:** Zellerbach, Thomas H.  
**Cc:** Goldman, Beth M.; Bush, Chelseaa  
**Subject:** RE: Depositions

Tom-

Thanks for confirming the Oct. 27 date.

As to the depositions of Cardiokine and Biogen, I will check with them on dates and revert back to you shortly.

Kind regards,

Christina

---

**From:** Zellerbach, Thomas H. [mailto:tzellerbach@orrick.com]  
**Sent:** Wednesday, October 19, 2011 5:25 PM  
**To:** Licursi, Christina M.  
**Cc:** Goldman, Beth M.; Bush, Chelseaa  
**Subject:** Depositions

Christina,

I want to confirm that the deposition of Brand Institute/William Johnson is going forward on October 27, 2011 at Orrick's New York office located at 51 West 52<sup>nd</sup> Street. It will begin at 10 a.m. EDT.

In addition, we would like to schedule the depositions of both Biogen and Cardiokine for next month. Can you please provide me some dates?

Thanks,

Tom



**O R R I C K**

**THOMAS H. ZELLERBACH**

*Partner*

**ORRICK, HERRINGTON & SUTCLIFFE LLP**

1000 MARSH ROAD  
MENLO PARK, CA 94025-1015

tel (650) 614-7446

fax (650) 614-7401

[tzellerbach@orrick.com](mailto:tzellerbach@orrick.com)

[www.orrick.com](http://www.orrick.com)

**REDACTED COPY**

# EXHIBIT E

**REDACTED COPY**



**Bush, Chelseaa**

---

**From:** Zellerbach, Thomas H.  
**Sent:** Wednesday, November 02, 2011 5:53 PM  
**To:** Christina M. Licursi  
**Cc:** Goldman, Beth M.; Bush, Chelseaa; Michael Albert  
**Subject:** RE: Depositions

Christina,

I've not heard back from you on dates and time is now very tight with the upcoming discovery deadline. I think at this point we need to push back the deadline a short while. That would not only give us some flexibility in scheduling the remaining depositions,

**REDACTED**

Please get

back to me right away if Cardiokine is agreeable to an extension of discovery.

Thanks,  
Tom

---

**From:** Christina M. Licursi [mailto:Christina.Licursi@WolfGreenfield.com]  
**Sent:** Wednesday, October 19, 2011 2:39 PM  
**To:** Zellerbach, Thomas H.  
**Cc:** Goldman, Beth M.; Bush, Chelseaa  
**Subject:** RE: Depositions

Tom-

Thanks for confirming the Oct. 27 date.

As to the depositions of Cardiokine and Biogen, I will check with them on dates and revert back to you shortly.

Kind regards,

Christina

---

**From:** Zellerbach, Thomas H. [mailto:tzellerbach@orrick.com]  
**Sent:** Wednesday, October 19, 2011 5:25 PM  
**To:** Licursi, Christina M.  
**Cc:** Goldman, Beth M.; Bush, Chelseaa  
**Subject:** Depositions

Christina,

I want to confirm that the deposition of Brand Institute/William Johnson is going forward on October 27, 2011 at Orrick's New York office located at 51 West 52<sup>nd</sup> Street. It will begin at 10 a.m. EDT.

In addition, we would like to schedule the depositions of both Biogen and Cardiokine for next month. Can you please provide me some dates?

Thanks,

**REDACTED COPY**

## **EXHIBIT F**

**REDACTED COPY**

**Bush, Chelseaa**

---

**From:** Christina M. Licursi [Christina.Licursi@WolfGreenfield.com]  
**Sent:** Friday, November 04, 2011 1:56 PM  
**To:** Zellerbach, Thomas H.  
**Cc:** Goldman, Beth M.; Bush, Chelseaa; Michael Albert  
**Subject:** RE: Depositions

Tom,

We have had a chance to discuss deposition dates and your request for an extension of discovery with both Cardiokine and Biogen.

**REDACTED**

In the meantime, we have already extended the deadlines previously, and Cardiokine and Biogen are both eager to see this matter resolved. Accordingly, they will not agree to any further requests for extensions. With more than three weeks before the close of discovery, we should be able to find dates that work for both depositions, assuming your client insists on proceeding with both of them (we believe that one would be more than enough).

While we will obviously need a list of subjects for these depositions prior to confirming designees, it appears at this time that both Cardiokine and Biogen should be available the week of November 14. To avoid multiple trips, you can depose both of them here in Boston at our offices.

If for some reason we are unable to pin down dates prior to the close of discovery (November 30, 2011), we may be willing to conduct those (and only those) depositions after the November 30 deadline. To be clear, however, that would not constitute a further extension of discovery generally, but would just be an accommodation of your client's need to complete those two depositions after the formal close of discovery.

Please let us have some specific dates that work for you as well as a list of subjects for the depositions.

Thanks,

Christina

**REDACTED**

**REDACTED COPY**

# EXHIBIT G

**REDACTED COPY**

**Bush, Chelseaa**

---

**From:** Zellerbach, Thomas H.  
**Sent:** Tuesday, November 08, 2011 6:15 AM  
**To:** 'Christina M. Licursi'  
**Cc:** Goldman, Beth M.; Bush, Chelseaa; Michael Albert  
**Subject:** RE: Depositions

Christina,

I will not be back in my office until early afternoon PDT tomorrow. The only possibilities are the 15th and 16th but I do not yet know if I can clear those days. My strong preference would be to take these early in December but within the discovery period. Would you and your clients be willing to compromise on a very brief extension of that period (15-30 days) to enable that to happen?

Regards,  
Tom

**REDACTED**

**REDACTED COPY**

# EXHIBIT H

REDACTED COPY



Christina M. Licursi  
clicursi@wolfgreenfield.com  
direct dial 617.646.8384

November 11, 2011

**VIA E-MAIL AND FIRST CLASS MAIL**  
**tzellerbach@orrick.com**

Thomas H. Zellerbach, Esq.  
Orrick, Herrington & Sutcliffe LLP  
The Orrick Building  
405 Howard Street  
San Francisco, CA 94105

Re: Bayer Healthcare, LLC v.  
Biogen Idec MA, Inc. and Cardiokine Biopharma, LLC  
In re U.S. Application Serial No. 77/701134 for LIXALEV  
Opposition No. 91192781  
Our Ref.: C1346.50000US00

Dear Tom:

In follow-up to your e-mail correspondence dated November 9, 2011 and our earlier correspondence regarding the same, we are disappointed by your refusal to agree to our offer to allow Bayer to take the proposed depositions of Biogen and Cardiokine after the close of discovery. We have tried to be accommodating, but we simply cannot consent to any further requests to extend the discovery period.

If you recall, the discovery period originally opened on February 1, 2010. Accordingly, both sides have now had seventeen months to take any necessary discovery. We have been more than reasonable and accommodating throughout this proceeding. In fact, there have already been six requests for extensions of time made with the Board, each of which we have consented to.

With respect to this particular request for an extension, you first contacted us regarding possible depositions of Biogen and Cardiokine on October 19, 2011. Although both parties attended the deposition of the Brand Institute on October 27, you did not raise the issue of possible deposition dates with us at that meeting. In fact, the first substantive correspondence on possible dates came in an e-mail from you dated November 2, where you were already posturing

Thomas H. Zellerbach, Esq.  
November 11, 2011  
Page 2


for an extension of dates. At that time, we still had one month to iron out dates for depositions and we indicated that it was our strong preference to complete discovery in advance of the November 30 deadline. We confirmed that both of our clients would be available for depositions the week of November 14. In fact, as a measure of our good faith and as an effort to preemptively accommodate scheduling conflicts given the impending close of discovery, we offered to allow you to take these depositions in December after the formal close of the discovery period. We specified that this would not constitute a further extension of discovery generally, but would just be an accommodation of your client's need to complete these two depositions after the formal close of discovery. You allowed four days to pass before responding to our offer.

While you initially indicated that November 15<sup>th</sup> and 16<sup>th</sup> could work as possible dates, you finally responded on November 9<sup>th</sup> that these dates are no longer possible for you. While we agreed to an extension of time insofar as it was limited to the depositions of Biogen and Cardiokine, with twenty days still remaining in the discovery phase, you have nevertheless indicated that you will file another Motion to Extend with the Board. We note that we have yet to receive any formal notices for these depositions and that we are still awaiting lists of subjects for these depositions.

You have now had more than seventeen months to depose either of the defendants in this matter and to complete your discovery. At the very beginning of this proceeding we indicated that our clients were anxious to see this matter resolved as quickly as possible. We have nevertheless continuously been reasonable and cooperative throughout this proceeding, consenting to the extension of dates on multiple occasions. At this time we can only believe that these tactics to continue to extend discovery are attempts to obtain additional time to harass Biogen and Cardiokine and to waste their time and resources. We simply cannot allow this already protracted proceeding to continue ad infinitum. Obviously, we will formally oppose any Motion to Extend that Opposer filed with the Board.

Very truly yours,

WOLF, GREENFIELD & SACKS, P.C.

  
Christina M. Licursi

REDACTED COPY



# **EXHIBIT I**

**REDACTED COPY**



ORRICK, HERRINGTON & SUTCLIFFE LLP  
1000 MARSH ROAD  
MENLO PARK, CALIFORNIA 94025-1015  
tel +1-650-614-7400  
fax +1-650-614-7401  
WWW.ORRICK.COM

November 11, 2011

Via E-Mail and U.S. Mail  
christina.licursi@wolfgreenfield.com

Thomas H. Zellerbach  
(650) 614-7446  
tzellerbach@orrick.com

Christina M. Licursi, Esq.  
Wolf, Greenfield & Sacks, P.C.  
600 Atlantic Avenue  
Boston, MA 02210-2206

Re: Bayer Healthcare, LLC v. Biogen Idec MA, Inc., et al.

Dear Christina:

I am writing to correct some ambiguous, incorrect, and/or misleading statements in your letter to me today. First, the parties have not had seventeen months to take any necessary discovery; fact discovery has been stayed for significant periods of time during the proceeding. Second, both parties have requested extensions. Third, I did not contact you on October 19, 2011 about just "possible" depositions of Cardiokine and Biogen. Rather, I requested you provide specific dates when we could take their depositions. Fourth, I did not raise the issue of possible deposition dates on October 27 because I had already raised that issue directly with you and was awaiting a response from you (you were not at the deposition). Fifth, my first substantive correspondence with you about dates for Cardiokine's and Biogen's depositions was not on November 2 but a full two weeks earlier on October 19. Sixth, I never said that I could take the depositions on November 15<sup>th</sup> and 16<sup>th</sup>. I said that they were the only days in the week you offered that could be possible and only then if I could change my schedule which I quickly informed you I was unable to do. Seventh, It took me four days to get back to you because two of those days were on the weekend and, as I believe you know, I was out of the office on the other days. Eighth, we have not noticed the depositions of Cardiokine and Biogen because we don't have dates for those depositions. Ninth, Bayer has no interest in harassing Biogen and Cardiokine or in wasting either their or its own time and resources. Bayer does have a legitimate interest in taking their depositions in a procedural posture – during the discovery period – that will protect Bayer's rights.

Please let me know if you have any questions.

Very truly yours,



Thomas H. Zellerbach